United States Department of Labor
Employees' Compensation Appeals Board

C.A., Appellant	)	
and	)	**Docket No. 16-0294**
	)	**Issued: April 7, 2017**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, San Diego, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 4, 2015 appellant filed a timely appeal from a June 29, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish more than 12 percent permanent impairment of the left upper extremity for which he previously received a schedule award.

On appeal appellant asserts that he should receive the impairment rating found by his attending orthopedic surgeon.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 16, 2013 appellant, then a 57-year-old K9 officer, filed a traumatic injury claim (Form CA-1) alleging that he injured his left knee and shoulder when he tripped and fell performing a work-related inspection. He did not stop work.

Dr. Christopher T. Behr, a Board-certified orthopedic surgeon, began treating appellant on May 24, 2013. A June 20, 2013 magnetic resonance imaging (MRI) scan of the left shoulder demonstrated a large rotator cuff tear with compromise of the coracoacromial arch and moderate glenohumeral joint effusion. On June 25, 2013 Dr. Behr reviewed the MRI scan findings and recommended arthroscopic rotator cuff repair.

On July 17, 2013 OWCP accepted left shoulder sprain and expanded the claim to include left acromioclavicular sprain and partial left rotator cuff tear.

Dr. Behr performed authorized rotator cuff repair on September 11, 2013. He submitted reports beginning October 22, 2013 describing appellant's follow-up care. On December 10, 2013 Dr. Behr advised that appellant could return to limited duty on January 1, 2014.

Appellant filed claims for compensation (Form CA-7) beginning September 11, 2013 and received wage-loss compensation. He returned to modified duty on January 1, 2014 and received intermittent compensation thereafter for physical therapy appointments. On February 18, 2014 Dr. Behr advised that appellant could return to full duty.

On November 20, 2014 appellant filed a schedule award claim (Form CA-7). He submitted an April 1, 2014 report in which Dr. Behr advised that appellant had reached maximum medical improvement (MMI) and had continued occasional shoulder pain and limited shoulder motion. Dr. Behr described left shoulder physical examination findings. Range of motion (ROM) demonstrated 110 degrees of abduction, 110 degrees of forward elevation/flexion, 40 degrees of external rotation, 60 degrees of internal rotation, 30 degrees of extension, and 30 degrees of adduction. Dr. Behr diagnosed large left shoulder rotator cuff tear, treated with arthroscopic repair. He advised that, in accordance with page 403 (Table 15-5, Shoulder Regional Grid) of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[2] appellant had a class 1 impairment for a diagnosis of full-thickness tear with residual loss of function and abnormal motion, which yielded 13 percent upper extremity permanent impairment.

In a June 8, 2015 report, Dr. Arthur S. Harris, an OWCP medical adviser and a Board-certified orthopedic surgeon, noted his review of the record, including Dr. Behr's impairment evaluation. He noted that, under Table 15-5, for a diagnosed full-thickness rotator cuff tear, the maximum impairment value allowed is seven percent. Dr. Harris then calculated appellant's impairment using Dr. Behr's ROM. He advised that, under the ROM method, under Table 15-34 Shoulder Range of Motion appellant had 3 percent upper extremity impairment for loss of left shoulder flexion, 1 percent impairment for loss of shoulder extension, 3 percent impairment for loss of shoulder abduction, 1 percent impairment for loss of adduction, 2 percent impairment for

[2] A.M.A., *Guides* (6th ed. 2009).

loss of internal rotation, and 2 percent impairment for loss of shoulder external rotation, which resulted in 12 percent left arm impairment. Dr. Harris found that MMI was reached on April 1, 2014, the date of Dr. Behr's evaluation.

On June 29, 2015 OWCP granted appellant a schedule award for 12 percent permanent impairment of the left arm, for 37.44 weeks of compensation, to run from April 1 to December 19, 2014.

LEGAL PRECEDENT

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.[3] Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[4] FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., as the appropriate standard for evaluating schedule losses.[5]

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled "Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment.*" The document included various changes to the original text, intended to serve as an erratum/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[6] The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.[7]

[3] *See* 20 C.F.R. §§ 1.1-1.4.

[4] For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

[5] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[6] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

[7] *Isidoro Rivera*, 12 ECAB 348 (1961).

ANALYSIS

The issue on appeal is whether appellant has met his burden of proof to establish more than 12 percent permanent impairment of the left upper extremity for which he previously received a schedule award.

The Board finds that this case is not in posture for decision.

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation has been followed regarding the proper use of the diagnosis-based impairment (DBI) or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.[8] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[9] In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.[10]

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the June 29, 2015 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

CONCLUSION

The Board finds this case not in posture for decision.

[8] *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

[9] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[10] *Supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2015 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: April 7, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board